

STATE OF MICHIGAN  
IN THE SUPREME COURT

Appeal From The Michigan Court of Appeals  
Honorable Bill Schuette, Presiding

HARTMAN & EICHHORN BUILDING  
CO., INC., a Michigan corporation,  
Plaintiff/Counterdefendant,

Supreme Court Docket No. 129733

v

Court of Appeals Docket No. 249847

STEVEN DAILEY and JANINE  
DAILEY, a married couple; and ABN-  
AMRO d/b/a STANDARD FEDERAL  
BANK, jointly and severally,  
Defendants,

Oakland County Circuit Court  
Case No. 01-032203-CK

and

STEVEN DAILEY and JANINE  
DAILEY,  
Counterplaintiffs/Third-Party  
Plaintiffs/Appellees,

v

JEFFRY R. HARTMAN, an individual,  
Third-Party Defendant/Appellant.

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**MICHIGAN ASSOCIATION OF REALTORS®'  
BRIEF AMICUS CURIAE IN SUPPORT OF  
APPELLANT, JEFFRY R. HARTMAN**

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## **STATEMENT OF JURISDICTION**

This Court has jurisdiction pursuant to MCR 7.301(A)(2) and 7.302, an Application for Leave to Appeal from a September 13, 2005 Order denying Third-Party Defendant's Motion for Reconsideration having been timely filed on October 24, 2005 and that Application for Leave to Appeal having been granted by Order dated May 4, 2006.

## QUESTION PRESENTED FOR REVIEW

**I. ARE LICENSED RESIDENTIAL BUILDERS AND REALTORS®, WHOSE CONDUCT IS BOTH AUTHORIZED BY AND REGULATED BY THE STATE OF MICHIGAN PURSUANT TO THE MICHIGAN OCCUPATIONAL CODE, MCL 339.101 *et seq*, EXEMPT FROM LIABILITY UNDER THE MICHIGAN CONSUMER PROTECTION ACT?**

Third-Party Defendant/Appellant, Jeffry R. Hartman, answers “Yes.”

Defendants/Counterplaintiffs/Appellees, Steven and Janine Dailey, answer “No.”

The Michigan Court of Appeals answered “No.”

The trial court, it is assumed, would answer “Yes.”

Amicus Curiae, Michigan Association of REALTORS®, answers “Yes.”

## I. INTRODUCTION

The Michigan Association of REALTORS® (the “Association”) is Michigan’s largest non-profit trade association, comprised of 48 local boards and a membership of more than 34,000 brokers and salespersons licensed under Michigan law. Each day, the Association’s members are involved in hundreds of real estate transactions, each of which has the potential to expose them to civil claims based on alleged violations of the Michigan Consumer Protection Act (the “MCPA”), MCL 445.901, *et seq.* Like residential builders and various other professionals transacting business in the State of Michigan, the conduct of the Association’s members is subject to licensure and regulation pursuant to the provisions of the Michigan Occupational Code (the “Code”). MCL 339.101, *et seq.* For this reason, the Association and its members have a significant interest in the outcome of any court decision which might address or otherwise impact the scope of the MCPA’s exemption for a transactions or conduct “specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this State or the United States.” MCL 445.904(1)(a).

In *Grand Rapids v Consumers Power Co*, 216 Mich 409, 418; 185 NW 852 (1921), the Supreme Court stated: “[t]his Court is always desirous of having all the light it may have on the questions before it. In cases involving questions of important public interest, leave is generally granted to file a brief *Amicus Curiae* . . . .” The Association believes that this case involves an issue of fundamental importance to the Association and its more than 29,000 members, as it involves the scope of a statutory exemption to liability under the MCPA that applies to regulated professionals, including REALTORS®. The Association’s experience and expertise could be beneficial to this



Court in resolving the substantive issue presented by this appeal. Accordingly, the Association seeks leave to file this Brief Amicus Curiae in support of the position of Third-Party Defendant-Appellant.

## II. SUMMARY OF ARGUMENT

This appeal involves the issue of whether licensed residential builders and, by analogy, REALTORS®, as real estate licensees, can be held liable for alleged violations of the MCPA. The Association submits that in light of this Court’s decision in *Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999), the answer to this question is clearly “no.” The conduct of licensed residential builders and REALTORS® is both authorized and extensively regulated by the State of Michigan pursuant to the applicable provisions of the Code. As a result, in accordance with *Smith*, licensed residential builders, when engaging in activities regulated by the Code, are exempt from liability under the MCPA pursuant to MCL 445.904(1)(a).

Notwithstanding the clarity of the applicable law, the Court of Appeals, **in a published opinion**, held that Third-Party Defendant/Appellant, Jeffry Hartman (“Hartman”), a licensed residential builder, was not exempt under the MCPA. See, Court of Appeals Opinion, May 26, 2005 (the “5/26/05 Opinion”), Appellant’s Appendix, pp 38a-45a. Specifically, the Court of Appeals found a conflict between the present case and its prior opinion in *Forton v Laszar*, 239 Mich App 711; 609 NW2d 850 (2000), lv den 463 Mich 969 (2001). The Association believes that there is no conflict between the present case and *Forton*, and that, as discussed *infra*, the *Forton* case may be distinguished. However, since the Court of Appeals did find a conflict and expressly held

so in a published opinion, it is critical to all regulated industries within this State that the issue of the application of the exemption under the MCPA be resolved once and for all.

The current status of the law on this issue is inconsistent at best. While several panels of the Court of Appeals have followed *Smith* in unpublished decisions, the Court of Appeals panel in the present case declined to follow *Smith* and, instead, followed its earlier opinion in *Forton*. Should this Court not resolve the issue, circuit courts and other panels of the Court of Appeals will be faced with having to apply Court of Appeals' published cases to MCPA/residential builders cases which clearly and directly conflict with this Court's decision in *Smith, supra*. Accordingly, this Court should reverse the Court of Appeals' decision, and reinstate the trial court's decision, dismissing the MCPA claim against Hartman.

### **III. STATEMENT OF MATERIAL FACTS AND PROCEEDINGS**

#### **A. Background Facts**

The Association generally accepts the statement of facts contained in Third-Party Defendant/Appellant's Brief on Appeal, as highlighted by the following:

- (1) Third-Party Defendant/Appellant, Jeffry R. Hartman ("Hartman"), and Plaintiff/Counterdefendant, Hartman & Eichhorn Building Co., Inc. ("HEBC"), were, at all times relevant, residential builders, licensed by the State of Michigan. See, License Verifications, Appellant's Appendix, pp 200a-201a.
- (2) HEBC and Hartman were, at all times relevant, regulated by the State of Michigan.
- (3) Defendants/Counterplaintiffs/Third-Party Plaintiffs, Steven and Janine Dailey (the "Daileys"), filed claims against HEBC and Hartman based on the same facts in two distinct forums – here in

this lawsuit and with the State of Michigan. See, State of Michigan Complaint, Appellant's Appendix, pp 211a-228a.

**B. The MCPA Claims And The Court of Appeals' Ruling**

In the court below, the Daileys alleged that HEBC and Hartman violated the MCPA by misrepresenting the quality, grade and/or placement of construction materials during the course of the construction of the addition on their home. See, Third-Party Complaint, ¶¶ 89-93, Appellant's Appendix, p 114a. In response, Hartman claimed that he was exempt from liability under the MCPA because, at all times relevant, he had been a licensed residential builder engaged in the general transaction of the construction, maintenance and/or alteration of homes.

The Court of Appeals agreed but, pursuant to the Court of Appeals' Opinion in *Forton v Laszar*, 239 Mich App 711; 609 NW2d 850 (2000), lv den 463 Mich 969 (2001), and MCR 7.215(J), held Hartman liable under the MCPA. See, 5/26/05 Opinion, pp 4-5, Appellant's Appendix, pp 41a-42a. The Court of Appeals declared a conflict with *Forton* for the stated reason that, "if we were not bound by [*Forton*], we would hold that the MCPA does not apply to the performance of residential construction, renovation or repair by licensed residential builders." The Court of Appeals, however, denied convening of a special panel. See, Court of Appeals' Order, June 22, 2005 (the "6/22/05 Order"), Appellant's Appendix, p 46a. Thereafter, the Court of Appeals denied Hartman's Motion for Reconsideration – **notwithstanding that all three panel members agreed that the MCPA does not apply to residential builders.** See, Court of Appeals' Order, September 13, 2005 (the "9/13/05 Order"), p 1, Appellant's Appendix,

p 47a. For the reasons discussed below, *Forton* may be distinguished and, following *Smith*, and cases subsequent to *Smith*, this Court may resolve the inconsistencies in the law and rule that licensed residential builders and, here, Hartman, are exempt from claims made under the MCPA when engaged in a regulated activity.

#### **IV. ARGUMENT**

##### **A. As A Matter Of law, Both Residential Builders And REALTORS® Are Exempt From Liability Under The MCPA**

###### **1. Standard Of Review**

The standard of review in this matter is *de novo* as it involves the interpretation and application of a statute. See, *McJunkin v Cellasto Plastic Corp*, 461 Mich 590, 596; 608 NW2d 57 (2000), citing *Lincoln v General Motors Corp*, 461 Mich 483, 489-490; 607 NW2d 73 (2000).

###### **2. Issue On Appeal**

The issue presented by this appeal may, at first blush, appear to pertain only to residential builders – not REALTORS®. The precise legal issue is whether licensed residential builders, whose conduct is authorized by and subject to regulation under the Code by the Board of Residential Builders and Maintenance and Alterations Contractors (the “Board”) created within the Michigan Department of Consumer & Industry Services (the “Department”), can be held liable for violating the MCPA for misconduct allegedly committed while engaged in the regulated activity of building an addition on a home. The answer to this question is clearly “no,” since under this Court’s

decision in *Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999), licensed residential builders are exempt from liability under the MCPA.

Since REALTORS® are also licensed and regulated under the provisions of the Code, they too are exempt from liability under the MCPA when engaged in a regulated transaction. Existing case law to the contrary – specifically, the Court of Appeals’ decision in *Price v Long Realty*, 199 Mich App 461; 502 NW2d 337 (1993) – is incorrect as a matter of law and should be expressly repudiated. In fact, in light of *Smith*, any decision which perpetuates the notion that licensed builders and/or REALTORS® can be held liable for violating the MCPA while engaged in their licensed activities is simply contrary to law. It is for this reason that the Association seeks to appear as amicus and urge this Court to rule that the exemption to the MCPA applies and that the MCPA claims must be dismissed as a matter of law.

### **3. REALTORS® Are Licensed And Regulated By The State Of Michigan**

Like residential builders, real estate brokers and salespersons, are licensed and regulated under the Code, specifically Article 25. MCL 339.2501-MCL 339.2518. Pursuant to Section 2502 of the Code, MCL 339.2502, a board of real estate brokers and salespersons is created within the Department. MCL 339.307(1). This board is likewise responsible for promulgating rules which set minimal standards of practice, interpreting licensure and registration requirements, and assessing penalties for violating the Code or rules. See, MCL 339.307-MCL 339.317.

As with builders, subject to certain limited exemptions, only a person who possesses the requisite license is authorized to engage in the regulated activities of a licensed real estate broker or salesperson. See, MCL 339.601(1); MCL 339.2503; MCL 339.2508. Further, like builders, real estate brokers and salespersons who violate the Code or rule provisions applicable to their profession, or who engage in misconduct such as fraud, dishonesty, gross negligence or incompetence, are subject to numerous statutory penalties set forth in Article 6 of the Code. See, MCL 339.2512; MCL 339.604; MCL 339.602. Those penalties include, but are not limited to, license suspension, license revocation, civil fines and restitution. MCL 339.602.

**4. Michigan Supreme Court Case Law Provides That Licensed REALTORS® Engaged In The Authorized And Regulated Practice Of Their Respective Occupations Are Exempt From Liability Under The MCPA; Prior Case Law To The Contrary Has Been Effectively Overruled**

The Michigan Legislature, in adopting the MCPA, excluded from coverage certain conduct and transactions that are otherwise regulated under Michigan law. In this regard, § 4(1)(a) of the MCPA, MCL 445.904(1)(a), specifically exempts from coverage:

A transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States.

It is Hartman's position that because he is a licensed residential builder under the Code, and because the building, altering, renovating and repairing of homes is specifically regulated under the Code, his actions expressly fall within this exemption to

the MCPA. As will be discussed fully below, the only issue for purposes of determining whether the MCPA exemption is applicable is whether the conduct in question is regulated under the Code. If so, then the law is clear that the MCPA does not apply.

The scope of the Section 4(1)(a) exemption to the MCPA is controlled by this Court's decisions in *Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999); and *Attorney General v Diamond Mortgage Co*, 414 Mich 603; 327 NW2d 805 (1982). Under those decisions, the statutory exemption will apply so long as the "general transaction" at issue is authorized by law, even though the legality of a defendant's conduct in performing the transaction might be in dispute. To this extent, as discussed below, *Smith*, decided in 1999, effectively overrules prior Michigan case law involving the application of the MCPA exemption to real estate licensees. See, *Price v Long Realty, Inc*, 199 Mich App 461; 502 NW2d 337 (1993).

The issue in *Price* was whether a licensed real estate broker could be held liable for violating the MCPA for allegedly having made certain fraudulent misrepresentations in connection with the sale of the property. The Court of Appeals held that the real estate broker could be subject to liability under the MCPA because the broker's license did not specifically authorize the perpetration of a fraud. *Price, supra*, 199 Mich App at 470.

However, in light of this Court's decision in *Smith, supra*, the Court of Appeals' holding in *Price* is incorrect as a matter of law. The panel in *Price* incorrectly focused on whether the alleged misconduct was specifically authorized. Further, the Price Court failed to examine the overall transaction at issue (the sale of real estate) and

whether that activity was specifically authorized under laws administered by the State or other regulatory board or officer. *Price, supra*, 199 Mich App at 470-471.

In *Smith*, the plaintiff alleged that the defendant insurance company violated the MCPA when it made certain misrepresentations in connection with a policy of credit life insurance purchased by the plaintiff's decedent. *Smith, supra*. Applying a "common sense reading" of Section 4(1)(a), the Court of Appeals held that the legislature did not intend to exempt illegal conduct from coverage under the MCPA, and thus, the exemption contained in Section 4(1)(a) would not apply. *Id.* at 453. In reversing the Court of Appeals on this issue, this Court explained:

[W]e conclude . . . that, when the Legislature said that transactions or conduct "specifically authorized" by law are exempt from the MCPA, it intended to include conduct the legality of which is in dispute. Contrary to the "common-sense reading" of this provision by the Court of Appeals, we conclude that the relevant inquiry is not whether the specific misconduct alleged by the plaintiffs is "specifically authorized." Rather, it is whether the general transaction is specifically authorized by law, regardless of whether the specific misconduct alleged is prohibited. Therefore, we conclude that § 4(1)(a) generally exempts the sale of credit life insurance from the provisions of the MCPA, because such "transaction or conduct" is "specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States."

*Id.* at 465-466 (emphasis added, footnotes omitted).

The focus on the authorized nature of the "general transaction" rather than the "specific misconduct" for purposes of applying the Section 4(1)(a) exemption is nothing new. As this Court noted in *Smith*, the issue is controlled by the Court's prior



decision in *Diamond Mortgage, supra*. In that case, this Court held that a mortgage company's real estate broker's license would not insulate it from liability under the MCPA for fraudulent activities committed in connection with writing mortgages.

*Diamond Mortgage, supra*, 414 Mich at 615-617. The basis for this holding was that the general activity – i.e., mortgage writing – was not an activity that was authorized by the defendant's real estate broker's license. Summarizing the holding in *Diamond Mortgage*, this Court in *Smith* explained:

As the Court of Appeals recognized, our decision in *Diamond Mortgage* controls the resolution of this issue.

\* \* \*

The defendant in *Diamond Mortgage* argued that it was exempt from the MCPA under § 4(1)(a) because it had a real estate broker's license and that one of the activities contemplated was that a licensee would negotiate the mortgage of real estate. Like plaintiff here, the defendants in *Diamond Mortgage* responded that “no statute [or regulatory agency] specifically authorize[d] misrepresentations or false promises” made in conducting that activity.

In concluding that the defendants were not exempt from the MCPA, this Court reasoned: While the license generally authorizes Diamond to engage in the activities of a real estate broker, it does not specifically authorize the conduct that plaintiff alleges is violative of the Michigan Consumer Protection Act, nor transactions that result from that conduct. In so concluding, we disagree that the exemption of § 4(1) becomes meaningless. While defendants are correct in stating that no statute or regulatory agency specifically authorizes misrepresentations or false promises, the exemption will nevertheless apply where a party seeks to attach such labels to “[a] transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority

of this state or the United States.” For this case, we need only decide that a real estate broker’s license is not specific authority for all the conduct and transactions of the licensee’s business.

In short, *Diamond Mortgage* instructs that the focus is on whether the transaction at issue, not the alleged misconduct, is “specifically authorized.” Thus, the defendant in *Diamond Mortgage* was not exempt from the MCPA because the transaction at issue, mortgage writing, was not “specifically authorized” under the defendant’s real estate broker’s license.

*Id.* at 463-464 (emphasis added).

Accordingly, as indicated, the *Smith* decision effectively overrules prior Michigan precedent involving the application of the MCPA’s exemption to real estate licensees. Specifically, in *Price v Long Realty, Inc*, 199 Mich App 461; 502 NW2d 337 (1993), the Court of Appeals, purporting to follow *Diamond Mortgage*, held that real estate licensees were not exempt from the MCPA for alleged fraudulent activities committed in connection with the sale of real estate because the regulatory scheme does not “authorize” the perpetration of a fraud. *Id.* at 471. However, as the decision in *Smith* makes clear, the Court of Appeals in *Price* misconstrued the holding of *Diamond Mortgage*. The focus is not on whether the alleged misconduct is authorized. The focus is on whether the transaction is authorized. Accordingly, *Price* has been effectively overruled by *Smith*.

**5. Recent Court of Appeals' Decisions Follow *Smith*  
And Expressly Hold That Licensed  
REALTORS® Are Exempt Under The MCPA**

This reading of the *Smith* case was recently confirmed by the Court of Appeals in an unpublished decision, *Winans v Paul & Marlene, Inc.*, 2003 WL 21540437 (Mich App, July 8, 2003). In *Winans*, plaintiffs brought suit against their builder when their house flooded soon after they moved in. The defendant builder sought a directed verdict on the MCPA claim, claiming it was exempt under this Court's decision in *Smith*. The Court of Appeals agreed, finding that "the question in the case at bar is whether the activity involved comes within the scope of the residential licensing scheme:"

We think *Smith* makes it clear that we look to the general transaction involved, not the specific action which plaintiff alleges violates the MCPA. Here, the general transaction was the construction of a residence on plaintiffs' lot, which is regulated. That is to say, while the actions in *Diamond Mortgage* of writing mortgages was not the type of activity for which one needs a real estate broker's license, the actions in the case are [sic] bar are those of someone who needs a residential builder's license.

*Winans* at p 4, Appellant's Appendix, pp 237a-246a.

Likewise, in *Timmons v DeVoll*, 2004 WL 345495 (Mich App, Feb. 24, 2004), app den 471 Mich 906 (2004), plaintiffs-buyers sued the sellers and the sellers' listing agent for failing to disclose material defects in the home; specifically, regarding the electrical system, pool heater, wall liner and equipment, plumbing system, central air conditioning, central heating system and furnace. Plaintiffs also alleged that there was evidence of water damage in the basement and that an addition to the home had been constructed without necessary permits – neither condition of which had been disclosed.

Plaintiffs claimed that these facts supported the claim against the defendant real estate agent for violating the MCPA. The trial court disagreed and dismissed the MCPA claim, and the Court of Appeals affirmed, stating:

The MCPA provides an exemption for “a transaction or conduct specifically authorized under the laws administered by a regulatory board or officer acting under statutory authority of this State or the United States” MCL 445.904(1)(a).

In the present case Curtis’ role as DeVoll and Franklin’s real estate agent, was simply to list the home for DeVoll and Franklin, the same home that he had listed for them on previous occasions, and thus the “transaction” and his “conduct” are exempt from the act under the above-noted exemption.

*Timmons* at p 6, Appellant’s Appendix, pp 257a-262a.

Similarly, in *Love v Ciccarelli*, 2004 WL 981164 (Mich App, May 6, 2004), the purchasers sued both the seller and the seller’s real estate agent after they discovered several defects in the home that they had purchased. Plaintiff-purchasers cited the *Diamond Mortgage* decision in support of their theory that the MCPA exemption did not apply because the Code does not specifically authorize misrepresentations. The Court of Appeals rejected this argument, stating that the plaintiffs had misconstrued *Diamond Mortgage* and this Court’s interpretation of it in *Smith*. The Court stated:

Plaintiffs, in the present case, improperly place emphasis on whether the specific conduct was authorized rather whether the general transaction was authorized. In the present case defendants’ role as the real estate broker for the Ciccarellis, was simply to sell the real property and engage in real estate services for the Ciccarellis, both activities authorized and within the definition provided in MCL 339.2501(d) and (e) and, thus, the “transaction” and defendants’ “conduct,”

which are “specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States,” are exempt from the MCPA under the above noted exemption, MCL 445.904(1)(a). Therefore, the trial court properly dismissed this claim, as summary disposition was proper.

*Love* at p 4, Appellant’s Appendix, pp 263a-266a.

Most recently, in *Gleason v Nexes Realty, Inc*, 2005 WL 3004117 (Mich App, December 6, 2005), plaintiffs, potential buyers, sued the defendant real estate broker under the MCPA for failure to convey plaintiffs’ offer to purchase a home to the sellers. The trial court granted defendants’ motion for summary disposition based on the exemption and the Court of Appeals affirmed, stating:

The general transaction at issue is the presentation of a potential buyer’s offer to the seller by the seller’s agent. This transaction is specifically authorized by law under the Michigan Administrative Code, 1999 AC, R 339.22307. Therefore, based on the holding in *Smith*, the transaction or activity is exempt from the MCPA under MCL 445.904(1)(a).

*Gleason* at p 3. Appellant’s Appendix, pp 267a-269a.

Accordingly, recent unpublished decisions of the Court of Appeals expressly held that both licensed residential builders and licensed real estate brokers and salespersons are exempt under the MCPA when the general transaction (i.e., construction of the home and/or sale of a home) is regulated. However, recent published decisions of the Court of Appeals do not.

## **6. The *Forton* Decision Does Not Apply To This Case**

Notwithstanding *Smith*, *Winans*, *Timmons* and *Love*, there continues to exist authority from the Court of Appeals (in addition to *Price*), and upon which the Court of Appeals relied in this case, which holds that licensed builders and REALTORS® can be subjected to liability under the MCPA. Specifically, in *Forton v Laszar*, 239 Mich App 711; 609 NW2d 850 (2000), lv den 463 Mich 969 (2001), the Court of Appeals held that licensed residential builders are subject to claims under the MCPA because the MCPA's definition of "trade or commerce" includes residential builders who construct and sell homes for personal family use. *Id.* at 715. In reaching this conclusion, the Court of Appeals relied in part on observations from *Price*, *supra*, that "the MCPA is a remedial statute designed to prohibit unfair practices in trade or commerce and must be liberally construed to achieve its intended goals." *Id.* In an Order entered February 16, 2001, this Court denied the builder's application for leave to appeal in *Forton*. See, *Forton v Laszar*, 463 Mich 969; 622 NW2d 61 (2001), lv den 463 Mich 969 (2001).

However, *Forton* does not apply to this case. The applicability of the Section 4(1)(a) exemption was not raised by the builder in *Forton* until the filing of a motion for rehearing in the Court of Appeals. Therefore, the *Forton* Court never even considered the issue of whether the exemption applied, much less decided against its application. In fact, in a concurring opinion denying leave to appeal, Justice Corrigan explained that, while not timely raised, nonetheless, the argument that builders were

exempt from liability under the MCPA appeared to have “substantive merit.” In relevant part, Justice Corrigan observed:

Subsection 4(1)(a) of the MCPA provides that the MCPA “does not apply” to “[a] transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States.” Defendant now contends that his sale to plaintiffs comes within this exemption because he is a residential builder licensed and regulated under the Michigan Occupational Code, M.C.L. § 339.101 *et seq*; MSA 18.425(101) *et seq*. Of particular importance, argues defendant, is article 24 of the Occupational Code, which prohibits residential builders from departing from plans without consent. See M.C.L. § 339.2411(2)(d); MSA 18.425(2411)(2)(d). In *Smith, supra*, we explained that the words “transaction or conduct” in subsection 4(1)(a) of the MCPA referred to the general transaction at issue rather than the specific misconduct alleged. We then held that subsection 4(1)(a) exempted the sale of credit life insurance from the MCPA, because (1) the sale of credit life insurance was specifically authorized under the state laws governing the sale of insurance, and (2) those laws were administered by the Insurance Commissioner. Arguably, the logic of *Smith* would apply equally to defendant’s sale of a residential home, because (1) portions of the Occupational Code regulate the conduct of residential builders, and (2) residential builders are regulated by the Residential Builders’ and Maintenance and Alteration Contractors’ Board.

*Forton, supra*, 463 Mich at 970 (Opinion of Corrigan, J.).<sup>1</sup>

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<sup>1</sup> The Association is also aware of the cautionary statement in the concurrence authored by Justice Marilyn Kelly, joined by Justice Cavanagh, that nothing of “precedential significance” should be gleaned from Justice Corrigan’s concurrence. *Forton*, 463 Mich at 971. Nonetheless, the fact that Justice Corrigan’s opinion technically lacks “precedential significance” does not detract from the correctness of her analysis.

The decision in *Forton*, coupled with the existence of the *Price* decision, combined with the published decision of the Court of Appeals in this case, merits a definitive statement from this Court that under *Smith*, both licensed builders and REALTORS® are exempt from liability under the MCPA when acting within the scope of their regulated activities. This is particularly true given the holdings of *Diamond Mortgage*, *Smith* and *Winans* as applied to facts of this case. Simply stated, the general transaction at issue in this case – i.e., the alteration of a residence – is an activity expressly authorized and regulated by Michigan statutory law governing real estate licensees. Specifically, real estate brokers and salespersons in Michigan are licensed and regulated under the provisions of the Code, MCL 339.101, *et seq.* Pursuant to Section 2508 of the Code, MCL 339.2508, individuals, and principals of various entities to whom a broker's license has been issued, are authorized to perform the acts regulated by Article 25.

Because Hartman was generally authorized by the Code to build homes, it makes no difference whatsoever, for purposes of the statutory exemption, that the propriety of Hartman's actions are in question. See, *Smith, supra*; *Diamond Mortgage, supra*. Rather, that the general activity is authorized and regulated as part of a statutorily created regulatory scheme administered by a board or officer of this State is the basis for applying the MCPA exemption. See, *Smith, supra*, quoting *Kekel v Allstate Ins Co*, 144 Mich App 379, 384; 375 NW2d 455 (1985). Such was clearly the case here.



**B. The Law In Other States Supports The Trial Court Decision**

Michigan is not alone in employing the standard set forth in *Smith, supra*, in construing statutory exemptions for “specifically authorized or regulated” conduct or transactions. For example, the New Hampshire Supreme Court recently renounced its previous narrow construction of that state’s Consumer Protection Act exemption, returning to the view that overall governmental regulation of a business activity entitles a defendant to claim the protection of the exemption for regulated conduct. *Averill v Cox*, 145 NH 328; 761 A2d 1083 (2000). Similarly, in *State v Piedmont Funding Corp*, 119 RI 695; 382 A2d 819 (1978), the Rhode Island Supreme Court construed a statutory exemption substantially similar to that found in the MCPA to afford blanket exemption to participants in regulated activities:

The question before this court is whether the activities of defendants were “permitted” by state and federal agencies as that term is used in section 4 of the Act and, therefore, exempt from the provisions of the Act. The plaintiff contends that section 4 does not exempt a business activity from the mandate of the Act simply because it is subject to governmental regulation unless the regulating agency has established that the manner in which the transaction was conducted is a proper way of doing business. We do not agree with this analysis.

Section 6-13.1-4 reads as follows:

Exemptions. Nothing in this chapter shall apply to actions or transactions permitted under laws administered by the Department of Business Regulation or other regulatory body or officer acting under statutory authority of this state or the United States.

In interpreting this provision of the act, we follow the rule of construction which requires that the language in a statute be given its plain and every day meaning unless it is ambiguous. *Andreozzi v D'Antuono*, 113 RI 155, 158, 319 A2d 16, 18 (1974). Giving the language of s 6-13.1-4 its plain meaning, we conclude that the Legislature clearly exempted from the act all those activities and businesses which are subject to monitoring by state or federal regulatory bodies or officers.

*Id.* at 821-822 (emphasis added). Accord, *Kelley v Cowesett Hills Assoc*, 768 A2d 425, 431-432 (RI, 2001) (statutory regulation of asbestos abatement precluded unfair trade practice claim by consumer arising from same).

Other states have also concurred in a broad interpretation of statutory exemption language, finding the language to exempt any statutorily-regulated transactions or conduct. See, *Ferguson v United Ins Co of America*, 163 Ga App 282; 293 SE2d 736, 737 (1982) (suit by beneficiary to recover life insurance proceeds barred by specific authorization and regulation of insurance under Georgia's insurance code); *First of Maine Commodities v Dube*, 534 A2d 1298 (Maine, 1987) (commission dispute between real estate broker and vendors; "[b]ecause by statute the Maine Real Estate Commission extensively regulates brokers' activities, including the execution of exclusive listing agreements, such activities fall outside the scope of Maine's Unfair Trade Practices Act and Consumer Solicitation Sales Act"); *Little v Gillette*, 218 Neb 271; 354 NW2d 147 (1984) (dispute over sale of fast food franchise by bank and real estate broker; "the exemption provision . . . is clearly stated and is applicable in the instant case. The bank is regulated by the Nebraska Department of Banking and Finance. Gateway is regulated by the Nebraska State Real Estate Commission. It is obvious that the appellee's invitation

[to impose Consumer Protection Act liability] was directed to the wrong branch of government”); and *Irwin Rogers Ins Agency, Inc v Murphy*, 122 Idaho 270; 833 P2d 128, 134 (1992) (sale of insurance regulated by state agency, barring consumer protection claim).

As the above cases illustrate, this Court is not alone in its interpretation and application of the MCPA exemption. On the contrary, this Court’s interpretation of the Legislature’s intent in *Smith* is consistent with the holdings in other states. Accordingly, properly applied, *Smith* mandates the conclusion that both REALTORS® and builders are exempt from liability under the MCPA.

## **V. CONCLUSION AND RELIEF REQUESTED**

For all the within stated reasons, the Association respectfully requests that this Honorable Court grant the Association’s Motion for Leave to File a Brief Amicus Curiae, reverse the Court of Appeals and reinstate the trial court’s grant of summary disposition in favor of Hartman and rule, as a matter of law, that licensed residential builders and REALTORS® are exempt from liability under the MCPA when engaged in a regulated activity. This Court should further directly overrule the decision in *Price*, *supra*, as being inconsistent with this Court’s decisions in *Diamond Mortgage* and *Smith*.

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